NOT FOR PUBLICATION — for upload

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

Kenneth Edwards,	)
	)
Appellant,	)**D.C. Crim App. No. 1997-014**
	)
v.	)Re: Terr. Ct. Crim. No. F186/1996
	)
Government of the Virgin Islands,	)
	)
Appellee.	)
	)

ATTORNEYS

Richard H. Dollison, Esq.
St. Thomas, U.S.V.I.
Attorney for Appellant,

Maureen P. Cormier, Esq.
Asst. Attorney General, Dept. of Justice
Attorney for Appellee.

OPINION

Moore, J.

On April 4, 2001, the United States Court of Appeals for the Third Circuit dismissed Kenneth Edwards' appeal for lack of jurisdiction because his notice of appeal was not filed within ten days of the entry of judgment by this Court as required by Rule 4(b) of the Federal Rules of Appellate Procedure ["Fed. R. App. P."]. The Court of Appeals dismissed Edwards' appeal without prejudice, however, suggesting that the Appellate Division might in its discretion extend the time for filing a notice of appeal

pursuant to Fed. R. App. P. 4(b)(4). Accordingly, Edwards brings this "Emergency Motion for Reinstatement of Appeal." The government timely filed its opposition.

Background

On September 25, 2000, the Appellate Division filed its final order and judgment affirming Edwards' convictions for grand larceny and conspiracy to commit grand larceny and remanding this matter to the Territorial Court for an amendment to that court's judgment. On September 28, 2000, the Clerk of the Appellate Division noted the judgment in the Court's docket. On November 21, 2000, the appellate clerk issued the mandate, and on November 24, 2000, the Territorial Court entered a corrected judgment. On November 29, 2000, Edwards filed his notice of appeal to the United States Court of Appeals for the Third Circuit.

Discussion

Fed. R. App. P. 4(b)(1)(A)(i) provides that "[i]n a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after . . . the entry of the judgment or order being appealed." To determine the date upon which judgment of the Appellate Division was entered, the Court looks to Rule 28 of the Virgin Islands Rules of Appellate Procedure: "The notation of a judgment in the docket constitutes entry of the [judgment]." V.I. R. APP. P. 28 ["VIRAP"]("Entry of Judgment"). Thus, judgment

in this case was entered on September 28, 2000, the date judgment was noted on the docket. Yet Edwards did not file his notice of appeal until November 29, 2000, over sixty days later. Court-appointed counsel for Edwards, Richard A. Dollison, Esq., explains this lapse by stating that he did not receive a copy of the Appellate Division's order either by mail or in his District Court box (*i.e.*, the box assigned to the firm of Stryker, Duensing, Casner & Dollison) before the expiration of the ten-day period for filing a notice of appeal under Fed. R. App. P. 4(b)(1) or even before the thirty-day maximum extension of time allowed by Fed. R. App. P. 4(b)(4).[1] Attorney Dollison further asserts that he received notice of the judgment only after a certified copy of the mandate was mailed to him by the appellate clerk on November 22, 2000.

Edwards contends that because his counsel did not receive notice of the entry of judgment until long past the maximum time allowed for notice of appeal under Rule 4, this Court should exercise its equitable powers to either "correct" the record by

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[1] Rule 4(b)(4) further provides:

> Upon a finding of excusable neglect or good cause, the district court may——before or after the time has expired, with or without motion and notice——extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

FED. R. APP. P. 4(b)(4).

changing the date of entry of judgment to November 22, 2000, or vacate the judgment of September 25, 2000 and reenter it *nunc pro tunc* to November 22, 2000.[2] In support of his position, Edwards points to VIRAP 35(c),[3] which provides that the clerk of the Appellant Division shall serve notice of judgments "immediately upon entry of an order or judgment . . . by mail upon each party to the proceeding (or by putting a copy of the order or judgment in counsel's District Court box) together with a copy of any opinion respecting the order or judgment, and shall make a note in the docket of the mailing." VIRAP 35(c) ("Duties of Clerk"). He asserts that the appellate clerk's failure to serve the notice of judgment until November 22, 2000 or to make a note in the docket of service created a "unique and unfortunate set of circumstances" that warrants the equitable relief for which he prays.

Edwards' arguments must fail. First, counsel's receipt of notice is not a prerequisite to the clerk's valid entry of judgment, thus there is nothing to correct. *See* VIRAP 28. As

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[2] Although the Court of Appeals specifically referred to FED. R. APP. P. 4(b)(4) as the potential basis for this Court to extend the time for notice of appeal, Edwards essentially concedes that by its terms, Rule 4(b)(4) is of no avail because the notice of appeal was not filed within the 30-day maximum extension period, which would have expired on November 8, 2000. (*See* Mot. for Emergency Reinstatement of Appeal at 11-13). Instead, he argues that despite the literal requirements of the rule, the Court should nevertheless grant equitable relief due to "exceptional circumstances."

[3] In his memorandum, Edwards mistakenly refers to this rule as Rule 35(c) of the Appellate Division's Internal Operating Procedures.

already stated, a judgment of this Court is considered "entered" on the day it is noted in the docket, date of service on the parties notwithstanding. *See id.* Second, in his insistence that the clerk made an error of some kind, Edwards conflates the mailing done in connection with the issuance of the mandate with service of notice of entry of the judgment, mistakenly believing that the former somehow was intended to serve the purpose of the latter. This cannot be so, as the issuance of the mandate and the entry of judgment are entirely distinct. *See* VIRAP 32 ("The mandate of the Appellate Division shall issue twenty-one days *after the entry of judgment* unless the time is shortened or enlarged by order." (emphasis added)).[4] Moreover, handwritten notations on the Court's final order indicate that on September 27, 2000, the Clerk did in fact serve a copy of the order and opinion on Samuel A. Walker, Esq.[5] in conformance with VIRAP 35(c).[6] (*See* Emergency Motion for Reinstatement of Appeal Ex. E

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[4] That the mandate issued in this case more than twenty-one days after entry of judgment does not in any way affect the date of entry of judgment or the relevant time period for filing a notice of appeal. *See* VIRAP 32 ("The filing of a notice of appeal to the United states Court of Appeals for the Third Circuit will not stay the mandate.").

[5] According to Court records, Attorney Walker was an associate at the firm of Stryker, Duensing, Casner & Dollison who worked on Edwards' appeal with Attorney Dollison and even signed the appellant's brief, stating therein that he was "counsel for Edwards." (*See* Br. of Appellant at 23.)

[6] Rule 35(c) of our local appellate rules states in relevant part: "Immediately upon the entry of an order or judgment, the Clerk of the Appellate Division shall serve a notice of entry by mail upon each party to the proceeding (or by putting a copy of the order or judgment in counsel's

at 2 (order filed Sept. 25, 2000).)

The Court cannot help but note that nowhere in Edwards' motion is there any discussion of this apparent service on Attorney Walker. On the contrary, Attorney Dollison contends that "there is no evidence that the Appellate Division's order was circulated to counsel for Edwards . . . until November 22, 2000." (*See id.* at 12-13.) In fact, there is nothing *but* evidence that a copy was served on "counsel for Edwards" on September 27, 2000. Attorney Dollison obviously authorized Attorney Walker to sign the appellant's brief, and yet never provided any notice to the Court that Attorney Walker was no longer an attorney working on this appeal.[7] Attorney Dollison's belated attempt to foist the blame on the clerk's office for what is the likely result of intra-firm personnel issues is not well-taken. The Court is also somewhat disturbed by the fact that in his arguments for reinstatement of

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District Court box) . . . ." VIRAP 35(c). Thus, it would be perfectly proper for the Court to serve an attorney associated with a firm either by mail or by placing a copy of the order and opinion in the firm's District Court box.

[7] According to the Virgin Island Bar Association Directory of Attorneys (2000), Attorney Samuel Walker now works for the Florida Public Defender's Office in West Palm Beach, Florida. Thus, by the time the Appellate Division's judgment was filed in September 2000, Attorney Walker may no longer have been employed by the firm of Stryker, Duensing, Casner & Dollison. Unfortunately, this is not the only case affected by the firm's failure to pay attention to its cases. Pursuant to an order issued by the Appellate Division, the firm of Stryker, Duensing, Casner & Dollison has recently filed a report in the case of *Herbert v. Government*, Crim. App. No. 1997-001, outlining the changes to its policies regarding the designation of responsibility within the firm and methods for conveying information regarding firm personnel changes to the Court.

the appeal, counsel chose not to acknowledge the possibility that the lapse was due to his own error. At bottom, the "unfortunate set of circumstances" at work here is not any clerical or administrative error, but rather that Edwards' counsel failed to check the docket in his case for at least sixty days, if not more.

Even accepting for the sake of argument Edwards' assertion that the clerk failed to serve counsel with notice of the entry of judgment, the Court declines to apply the "unique circumstances" doctrine articulated by the Supreme Court in *Thompson v. INS*, 375 U.S. 384, 386-87 (1964), and urged by Edwards here. While certainly a viable doctrine in other circumstances not relevant here, this doctrine does not apply "to extend the time for appeal by more than the maximum specified by Rule 4 [of the Federal Rules of Appellate Procedure]." *See United States v. Rapoport*, 159 F.3d 1, 3 n.2 (1st Cir. 1998) (citing *United States v. Dumont*, 936 F.2d 292, 295 (7th Cir. 1991) (internal quotations omitted)). Furthermore, this Court has no power to grant the exceptional relief of vacating the judgment entered on September 27, 2000 and reentering it to deliberately circumvent the clear terms of Fed. R. App. P. 4(b)(4). *See, e.g.*, *Rapoport*, 159 F.3d at 3 & n.4 (determining that the district court's vacation and reentry of judgment due to failure of the clerk to notify the defendant was "without effect" and defendant's appeal was dismissed *sua sponte*

as untimely); *United States v. Buzard*, 884 F.2d 475, 476 (9th Cir. 1989) (district court has no authority to vacate and reenter earlier order due to the clerk's failure to mail notice and appeal was dismissed *sua sponte*); *United States v. Matos*, 1999 U.S. Dist. LEXIS 19288 at *12-13 (E.D. Pa. Dec. 10, 1999) ("[F]ailure to receive notice of a court order cannot justify such exceptional relief after expiration of the maximum extension period provided in Fed. R. App. P. 4."). Accordingly, the Court will deny Edwards' motion for reinstatement of his appeal.

An appropriate order follows.

ENTERED this 17th day of May, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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Asst. Attorney General, Dept. of Justice
Attorney for Appellee.

ORDER

For the reasons stated in the accompanying Opinion of even date, it is hereby

ORDERED that the appellant's motion for reinstatement of his appeal is **DENIED.**

ENTERED this 17th day of May, 2001.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
ORINN ARNOLD
Clerk of the Court

By:_____
Deputy Clerk

Copies to:
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